3-11-2014

Sales v. Peabody Appellant's Reply Brief Dckt. 41446

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY SALES, individually, Plaintiff-Appellant, vs. STACIE PEABODY, individually and doing business under the assumed name of FINGERPRINTS DAY SPA, Respondent-Defendants, and LINDA COOK, individually, Defendant.	**SUPREME COURT NO. 41446** **ADA COUNTY CASE NO. 2012-6516** **APPELLANT'S REPLY BRIEF**

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District, In And For The County of Ada.

HONORABLE MELISSA MOODY, DISTRICT JUDGE, PRESIDING

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RESPONSE TO DEFENDANT'S STATEMENT OF THE CASE

Plaintiff disputes many aspects of Defendant's statement of the case, as evidenced in Plaintiff's original brief. Plaintiff will address briefly only two aspects she feels are critical in her reply. First, Plaintiff did not argue for the first time in her motion to reconsider that the cause of her injuries was the bacteria-infested foot basin (apart from the "puncture"). (CR000281-CR000283). That entire argument is focused on the negligent condition of the foot basin alone and there is no reference to a "puncture" of any kind. Second, Defendant argues that Plaintiff introduced a new interpretation of her pleading on her motion to reconsider that directly contradicted the plain language of her pleading. Defendant does not point to the specific contradictory portions of Plaintiff's Complaint. She cannot do so because there is no contradictory language.

ARGUMENT

A. Genuine Issues of Material Fact Exist As to Plaintiff's Claim for Negligence.

Defendant addresses the issue of causation at some length in its response brief. Plaintiff desires to be very clear about the issue of causation on appeal in light of the district court's last order addressing that issue. The district court erred in originally granting summary judgment to Defendant on Plaintiff's claim for negligence in its order dated July 25, 2013. (CR000319-CR000329). In Count I – Negligence in Plaintiff's Complaint, Plaintiff alleges that "Defendants, individually . . . were negligent in . . . failing to keep tools and instruments in a safe and usable condition to avoid injury or infection to Plaintiff and others for whom they performed pedicure procedures; and otherwise failing to maintain the premises, facility, equipment, and working

conditions in a safe and reasonably prudent manner to avoid injury or infection to Plaintiff . . . Plaintiff was injured and otherwise damaged as a direct result of the incident alleged herein, which injuries and damages were directly and proximately caused by Defendants' negligence." (CR000008-CR000009).

The district court offered two bases for granting Defendant's summary judgment motion (1) that Plaintiff had not introduced facts to support causation and (2) that the prick or poke Plaintiff experienced at the time of the pedicure constituted an intervening, superseding cause. (CR000326, CR000328).

The issue of the claimed inadequacy of wording of Dr. Chandler's causation opinions was brought up *sua sponte* by the Court. The issue was never briefed by the parties through two motions for summary judgment, and the Court only requested case law on this issue of causation from the parties after oral argument on the second summary judgment motion. A district court may not decide an issue not raised in the moving party's motion for summary judgment. *Thomson v. Idaho Ins. Agency*, 126 Idaho 527, 530-531, 887 P.2d 1034 (1994); *Silicon International Ore, LLC v. Monsanto Company*, Idaho Supreme Court Case No. 39409, November 27, 2013. Plaintiff objected to the *sua sponte* raising of the issue regarding Dr. Chandler's affidavit. (CR000 348).

In his affidavit filed on August 7, 2013, Dr. Chandler clarified the meaning of the words "incident" and "treatment" in his prior affidavit. (CR000342-CR000344). The term "incident" referred to the presence of mycobacteria in the foot basin in which Plaintiff received the pedicure at Defendant's salon. (CR000343). The term "treatment" referred to the placement of Plaintiff's feet in the foot basin at Defendant's salon, where Plaintiff's toe became infected with a

mycobacteria. *Id.* With Dr. Chandler's additional affidavit, the district court acknowledged that a genuine issue of material fact existed as to causation. (CR000366).

While the district court acknowledged that a genuine issue of material fact existed as to the causation element of Plaintiff's negligence claim, it originally held, as a basis for granting summary judgment, that the actions of Defendant Cook constituted an intervening, superseding cause. (CR000326-CR000328). Plaintiff addressed the issue of causation on appeal so that the district court's final ruling on that issue would be the law of the case, in the event the district court's grant of summary judgment in favor of Defendant is reversed and remanded.

Defendant has not presented any authority that would remove the issue of proximate cause from the trier of fact or otherwise require a determination as a matter of law. Proximate cause as to Plaintiff's injuries is a question of fact for the trier of fact to determine. The case of *Cramer v. Slater*, 146 Idaho 868, 204 P.3d 508 (2009) and its progeny make that conclusion clear. *See also Lundy v. Hazen*, 90 Idaho 323, 411 P.2d 768 (1966); *Hayes v. Union Pac. R.R. Co.*, 143 Idaho 204, 141 P.3d 1073 (2006).

Plaintiff has never maintained or argued that the puncture by Ms. Cook was critical or indispensable to the causation of her damages. To argue such is an unfair reading of Plaintiff's Complaint and all the materials submitted in response to Defendant's multiple summary judgment motions. It is simply inaccurate.

Further, Plaintiff is not attempting to pigeonhole the district court on the issue of causation. The district court stated "In other words, there is now - arguably at least - a genuine issue of material fact on each element of negligence against Defendant Peabody for failing to clean the foot basin. The difficulty for the Court is that the tort Plaintiff has now supported with

enough evidence to survive summary judgment is not the same tort pled in the Complaint." (CR000366) (emphasis added). In the abundance of caution, Plaintiff appealed the issue of causation so she would not have to revisit the issue on remand in the event the case is remanded. However, the district court ultimately held there was a genuine issue of material fact as to each element of Plaintiff's direct negligence claim against Defendant.

Plaintiff has demonstrated a genuine issue of material fact as to the causation element, and she has demonstrated the only facts on the record as to the element of causation. Therefore, summary judgment is improper as to Plaintiff's claim for negligence against Defendant. Plaintiff respectfully requests this Court find that Plaintiff has demonstrated a genuine issue of material fact as to the causation element of her negligence claim.

Defendant's argument that Plaintiff raised a new cause of action against her on the motion for reconsideration without foundation or basis. Plaintiff alleged a direct action for negligence against Defendant in her Complaint. Defendant's second motion for summary judgment was prompted because she failed to address the direct cause of action for negligence against her in her original summary judgment motion. To now claim that she never had notice of a direct negligence action against her is disingenuous.

Defendant's argument regarding judicial estoppel is misplaced, as that doctrine applies only to inconsistent positions taken by a litigant under oath. "[A] litigant who obtains a judgment, advantage, or consideration from one party through means of sworn statements is judicially estopped from adopting inconsistent and contrary allegations or testimony, to obtain a recovery or a right against another party, arising out of the same transaction or subject matter." *Heinze v. Bauer*, 145 Idaho 232, 235, 178 P.3d 597 (Idaho 2008) *citing Loomis v. Church*, 76

Idaho 87, 277 P.2d 561 (1954). Such a situation does not exist here. Plaintiff has not made any inconsistent statements in this action, let alone any prior or subsequent action against another party, and the doctrine of judicial estoppel is inapposite here.

Plaintiff did not frame her cause of action or lead Defendant or the district court along with respect to the issue of causation. Plaintiff can allege and argue concurrent causes. Nevertheless, the expert opinions regarding causation submitted by Dr. Chandler are consistent. Defendant's argument that the term "injured" cannot include the placement of feet in a bacteria - infested foot basin lacks basis in law or fact. Plaintiff did not foster an impression or lead anyone along. Through two motions for summary judgment and a motion for reconsideration, Plaintiff was forced to respond to a moving target of issues from Defendant and *sua sponte* raising of issues not previously addressed or briefed by the parties. Through that process, Defendant never raised the issues of intervening, superseding cause or the sufficiency of Plaintiff's pleadings until after they were addressed by the district court. She did not do so because neither issue was a proper basis for granting summary judgment as to Plaintiff's direct negligence claim against her.

Defendant's argument regarding invited error is misplaced and meritless. Likewise, Defendant's argument regarding estoppel and holding back evidence is also misplaced and meritless. Plaintiff could not have foreseen that the district court would misconstrue Dr. Chandler's opinion, and therefore, Plaintiff was required to submit an additional affidavit from Dr. Chandler clarifying the misunderstanding. The doctrines of invited error and estoppel have no basis in law or fact in relation to (1) whether Plaintiff has established a genuine issue of material fact as to causation and (2) whether Plaintiff pled a cause of action for negligence against Defendant. Defendant attempts to grasp at irrelevant and tangential theories as she did at

the district court. Defendant attempts to use inflammatory language and to paint Plaintiff as a charlatan. However, her arguments lack substance and are not relevant to the issues on appeal.

B. Plaintiff Properly Asserted a Cause of Action for Negligence Against Defendant.

Defendant spends no time in her response brief addressing the substance of Plaintiff's Complaint and whether it asserts a direct cause of action for negligence against her. She did move for summary judgment specifically against that direct cause of action against her. She cannot now be heard to complain that she had no notice of such a cause of action.

This issue is the central and critical issue of this appeal, as it is the issue on which the district court granted summary judgment in favor of Defendant, after finding that Plaintiff had demonstrated a genuine issue of material fact as to each element of that negligence claim.

Plaintiff properly alleged a direct cause of action for negligence against Defendant. Plaintiff has demonstrated a genuine issue of material fact as to each element of that negligence claim. Therefore, Plaintiff requests that the district court's grant of summary judgment in favor of Defendant be reversed and remanded.

C. Defendant Should Not be Heard on Argument Regarding Issues Not on Appeal and Issues Irrelevant to the Appeal.

Defendant attempts to re-litigate a number of issues not on appeal and not germane to the district court's rationale for granting its motion for summary judgment. Plaintiff requests that this Court not consider these additional arguments. All of these issues lacked merit at the district court, and they lack merit on appeal. This Court should consider only those issues specifically assigned as error on appeal. *State v. Hoisington*, 104 Idaho 153, 159, 657 P.2d 17 (1983); *Taylor*

v. Browning, 129 Idaho 483, 491 927 P.2d 873 (1996). Thus, Defendant's extraneous and meritless arguments should not be considered.

Defendant provides argument as to the inadmissibility of Dr. Chandler's opinions submitted pursuant to affidavit. The district court properly admitted Dr. Chandler's affidavits as evidence. Defendant produced no expert testimony in response. Defendant's argument is without merit. Nevertheless, Defendant did not appeal the admissibility of Dr. Chandler's affidavits and should not now be heard with respect to those issues.

Defendant offers argument with respect to whether she owed a duty to Plaintiff, as well as the sufficiency and admissibility of the affidavits of Plaintiff's experts (Dr. Schoon and Dr. Chandler), which affidavits were admitted by the district court. Plaintiff disagrees with the substance and merit of these arguments. They were briefed and addressed at the district court and found to be without merit. Defendant has not cross-appealed, and therefore Plaintiff requests that this Court not consider these issues.

Further, Defendant attempts to make arguments from Plaintiff's medical records in the absence of any expert opinion regarding those records and without any issue regarding the sufficiency of Dr. Chandler's affidavit being appealed. Defendant's efforts to re-litigate every issue she attempted to prevail on at the district court should not be countenanced. Plaintiff respectfully requests that this Court disregard all argument presented by Defendant on issues that are not specifically assigned as error before this Court on appeal.

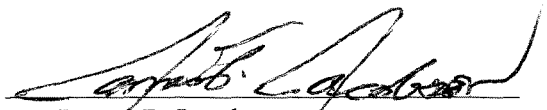
CONCLUSION

Plaintiff respectfully requests this Court reverse the district court's grant of summary judgment in favor of Defendant and remand this action for further proceedings consistent

therewith. Plaintiff respectfully requests this Court deny Defendant's requests for attorney fees and costs on appeal, there being no basis for such an award.

DATED this 11th day of March, 2014.

JACOBSON & JACOBSON, PLLC

By 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of March, 2014, a true and correct copy of the foregoing was served upon the follow attorneys of record via method below:

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